MOTION FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1708

STATE OF NEW YORK,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1716

S & E SHIPPING CORP.,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

No. 79-1718

SEAFARERS INTERNATIONAL UNION
OF NORTH AMERICA, AFL-CIO,
Petitioner,
v.
UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Seaboard Allied Milling Corp. ("Seaboard") and ADM Milling Co. ("ADM") respectfully move for leave to file

the attached brief *amici curiae* in this case. The consent of the attorneys for respondents United States of America, Interstate Commerce Commission, Consolidated Rail Corporation, Soo Line Railroad Company, the Pennsylvania Public Utility Commission, and ConAgra, Inc. has been obtained. The consent of petitioners S & E Shipping Corp. and Seafarers International Union of North America, AFL-CIO has been requested and refused. The consent of petitioner State of New York has been requested but no response to such request has been obtained.

The interests of Seaboard and ADM in this case arise from the grain milling facilities that they operate in New York State. Petitioners in this case have either directly asserted or strongly implied that the unit-train grain rate which is at issue has had and, if permitted to remain in effect, will continue to have a deleterious impact upon companies such as Seaboard and ADM who are substantially engaged in grain milling within the State of New York. Petitioners have also alleged that the rate at issue has had and, if permitted to remain in effect, will continue to have a negative impact on the lake carriers to whom Seaboard and ADM must look for water transportation of grain.

As alleged victims of the discrimination that petitioners contend to be inherent in the rate which is at issue in this case, Seaboard and ADM believe that their participation will assist the Court in obtaining a more accurate portrayal of the circumstances relevant to petitioners' assertions as to the allegedly discriminatory impact of the rate in issue.

Respectfully submitted,

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BRIEF AMICI CURIAE
IN OPPOSITION TO PETITIONS
FOR WRIT OF CERTIORARI

Seaboard Allied Milling Corp. ("Seaboard") and ADM Milling Co. ("ADM") submit that the petitions which have been filed with the Court in the above captioned cases do not identify any special or important issue that warrants issuance by this Court of the requested *writ of certiorari*. Seaboard and ADM respectfully request that the petitions be denied.

OPINION BELOW

The opinion of the U.S. Court of Appeals as to which review is sought by petitioners is reported at 600 F.2d 349.

JURISDICTION

The decision and mandate of the U.S. Court of Appeals as to which review is sought was entered on May 7, 1979. Petitions for rehearing were timely filed and rehearing was denied by order of the U.S. Court of Appeals dated January 31, 1980.

The statutory provision pursuant to which each of the petitioners seeks review is 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the opinion of the U.S. Court of Appeals affirming a decision of the Interstate Commerce Commission ("ICC") approving unit-train grain rates presents any special or important issue warranting review by this Court.

STATUTE INVOLVED

The principal statutory provision involved in these proceedings is Section 3(4) of the Interstate Commerce Act [49 U.S.C. § 3(4)] which is set out in Appendix G to the Petition of State of New York. The provisions of Section 3(4) have during the course of the proceedings

below been recodified without substantive change at 49 U.S.C. § 10701(c) and 49 U.S.C. § 10742. However, for purposes of consistency with statutory references in the opinions below, they are referred to herein by their former designation.

IDENTIFICATION AND INTERESTS OF SEABOARD AND ADM

Seaboard, with headquarters at Kansas City, MO., and ADM, with headquarters at Shawnee Mission, KS., are major agri-business companies engaged in milling and distribution of grain products. They each operate mills at various locations throughout the United States and are major users of both rail and water carrier transportation in connection with the movement of grain to their mills and the movement of grain products from their mills to their customers.

As is particularly pertinent here, Seaboard operates major milling facilities at both Albany and Buffalo, NY, and ADM operates a major milling facility at Hudson, NY. These mills represent investments of many millions of dollars and account for a significant percentage of the grain products milled in the State of New York.

The Buffalo mill can receive grain either by lake vessel or by unit train. The mills at Albany and Hudson can receive grain either by combination lake-rail movement or by all rail movement including transportation in unit trains which is the most efficient and economical method of moving large quantities of grain by rail. The unit train rates by which Seaboard and ADM move grain to their New York mills are constructed on the same basis as the unit train rate to Martins Creek which is at issue in these proceedings.

Both Seaboard and ADM incur transportation costs of tens of millions of dollars each year in the movement

of grain and grain products. Because the successful operation of the grain milling business is so heavily dependent upon the availability of responsive and affordable transportation services, both ADM and Seaboard have a direct interest in the maintenance and preservation of an economically sound national transportation system. In the procurement of their raw materials, in the location of their milling facilities, and in the distribution of their products, they are vitally concerned with taking the greatest possible advantage of the inherent capabilities of both water and rail transportation. They patronize both modes. They have a strong interest in maintaining the availability and economic vitality of each.

REASONS FOR DENYING THE WRIT

Seaboard and ADM believe, on the basis of their own experience as major users of both rail and water transporation, that the present relationship between lake and rail transportation of grain is fair and equitable and has been instrumental in stimulating a healthy and vigorous intermodal competitive environment which inures to the benefit of the milling industry in general and milling facilities within New York State in particular. The present highly desirable competitive environment is a direct consequence of the availability of unit train rates to New York milling locations. These rates are predicated upon the unit-train rate to Martins Creek which is fundamentally at issue in these proceedings.

The viability of both the Seaboard mill at Albany and the ADM mill at Hudson is dependent upon the continued availability of economical, efficient unit-train transportation of grain from midwestern producing areas. The availability of this competitive alternative and the restraint that it has imposed on transportation costs has directly contributed to the competitive ability of milling facilities in New York State. This has inured to the bene-

fit of the bakers who now have important alternative sources from which to buy flour and, in turn, the general public for whom baked goods are such a basic necessity of life.

Thus, the Martins Creek rate which is under attack in this proceeding has had and will continue to have a very salutory effect on the vitality and growth of the grain milling industry in New York, and on the consumers who are served by that industry. Seaboard and ADM* have no quarrel with it. Nor have they seen any indication that any of the lake carriers engaged in grain transportation have had any difficulty in maintaining a substantial market share of available traffic in spite of unit-train competition. Indeed, as the supplemental evidence received and considered by the ICC demonstrates, the total volume of grain handled by lake carriers to Buffalo has actually increased very steadily and very substantially since the Martins Creek unit-train rate became effective. See *Unit Train Rates on Wheat, Minn. & Wis. to Martins Creek, Pa.*, 356 ICC 82, 85 (1978).

New York's petition is predicated upon a very basic misapprehension of the impact of the Martins Creek rate on those who are involved in agricultural commerce in New York, including Seaboard and ADM. New York asserts that the rate has had a negative effect. Seaboard and ADM respectfully submit that such an assessment is simply and plainly wrong. They further submit that, as active participants in the grain trade in New York, they are in a far more advantageous position to accurately assess the impact of the Martins Creek unit-train rate than are the officials who have authorized the

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*** Although ADM originally opposed the Martins Creek unit-train rate before the ICC, it has long since abandoned that opposition and come to recognize that the availability of unit-train service as a competitive alternative to lake-rail service is in the public interest.**

filing of a petition with this Court on behalf of New York. It is for this reason that Seaboard and ADM have felt compelled to submit this brief in order that the Court, in its deliberation of this matter, may have before it the positions of two companies who are active and important participants in the flow of commerce that is allegedly prejudiced by the Martins Creek rate.

In sum, the legal arguments of New York and the two supporting petitioners are grounded squarely on the assumption that the Martins Creek unit-train rate has caused competitive injury to New York millers and the carriers (including lake carriers) on whom they depend for efficient, viable transportation of grain. However, that assumption, as demonstrated by the actual experiences of Seaboard and ADM, is totally incorrect.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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June, 1980

CERTIFICATE OF SERVICE

In accordance with the provisions of Rule 33(3), I hereby certify that copies of the foregoing motion and accompanying brief *amici curiae* have been served upon the following named counsel of record, via first class mail, postage prepaid, this 20th day of June, 1980:

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